Supreme Court, U. S.
FILED
NOV 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
MYRON FARBER,

Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION

RAYMOND A. BROWN,
Attorney for Respondent Mario E. Jascalevich, M.D.
BROWN, VOGELMAN & BROWN,
26 Journal Square,
Jersey City, New Jersey 07306.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF RESPONDENT	2
CONCLUSION	8
APPENDIX:	
Excerpt from Transcript of Oral Argument Before New Jersey Supreme Court on September 5, 1978	1a

Cases Cited

Branzburg v. Hayes, 408 U. S. 665 (1972)	6, 7
Marbury v. Madison, 1 Cranch 138 (1803)	5
Nebraska Press Assoc. v. Stuart, 427 U. S. 539 (1976)	6
Powell v. McCormick, 395 U. S. 486 (1969)	6
State v. Baird, 50 N. J. 376 (1967)	7
United States v. United States District Court, 407 U. S. 297 (1972)	5, 6

United States Constitution Cited

Sixth Amendment	7

Statute Cited

N.J.S.A. 2A:16-51 et seq.	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
MYRON FARBER,

Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION

Questions Presented

1. Whether a state legislature can deprive a criminal defendant of his Sixth Amendment right and similar

rights guaranteed by the state constitution, by enacting a statute establishing a reporter's privilege?

2. Whether a reporter and a newspaper can properly be held in contempt for refusing to comply with a valid *subpoena duces tecum* thereby obstructing justice and depriving a criminal defendant of a fair trial when legitimate demand has been made for documents in their possession, custody or control by aborting the procedure which could truly ascertain the *bona fides* of the claim?

3. Whether a reporter and a newspaper can arrogate to themselves the right to be the ultimate arbiters of a claim of privilege instead of a court of law?

Statement of Respondent

On October 24, 1978, Dr. Mario E. Jascalevich was acquitted of the remaining three counts of a five count indictment for murder that Myron Farber boasted he had instigated. Dr. Jascalevich, his wife and his two children were subjected to a terrible two and one-half year ordeal because Farber, "wants Jascalevich convicted" so that he could "become a very wealthy", according to United States District Court Judge Frederick Lacey.[1]

During the last weeks of the defense presentation, there was an opportunity to more fully explore Farber's role in this case. According to sworn testimony, Farber had indicated several years ago that Dr. Michael Baden was his private source in the New York City Medical Examiner's Office and that together they were secretly going through the office files at night in order to write

[1] Respondent's Appendix Q (submitted in support of motion to vacate stay, heretofore filed with the Court).

certain stories about the Medical Examiner's Office.[2] This is the same Dr. Baden who served as the State's principal witness and who, according to his own testimony, was visited by Farber prior to his first official contact with the Bergen County Prosecutor's Office.[3] It was also the same Dr. Baden who knew of and repeatedly spoke about a file in the New York City Medical Examiner's Office which he knew contained crucial scientific and factual data about the causes of death of several decedent's named in the indictment. That file was missing from the New York City Medical Examiner's Office when a search was made for it in connection with this case. That data had been reviewed by Dr. Milton Halpern, then the Chief Medical Examiner of New York, who decided that it was not worthy of additional work because there was no criminality involved. Mrs. Milton Halpern, who served from 1961-1974 as Dr. Halpern's personal secretary also observed Dr. Baden attempting to facilitate surreptitious entry into Dr. Halpern's office where this file was kept.

Given this factual background, as well as other information known to defense counsel since the beginning of the trial, it is easier to recognize why Petitioners fought even the *in camera* examination of the subpoenaed materials and a hearing. The hearing would have conclusively demonstrated that Faber and *The New York Times* had no legiti-

[2] Farber denied this, as he has denied many of his actions or tried to explain them away. Where his veracity has been tested, he has been shown to be less than truthful with the courts. The mere fact that Farber denies—or asserts—something cannot furnish support for Petitioners' position because it is not Farber's word that should be dispositive.

[3] Farber has denied visiting Baden.

mate basis upon which to claim the newsman's privilege in this case. In fact, when a hearing was held on the issue of waiver, the trial court—which had virtually the same information before it as it had on June 30, except for the contractual information—held that Farber had waived his claim to the privilege. Nonetheless, even though this Court vacated a stay entered by Mr. Justice Stewart so that there was no legal justification for refusing to respond, Farber took the law into his own hands and refused to answer specific questions relating to his activities and the documents in his possession when duly ordered by the court. He also refused to respond to questions where his supposed source indicated that no confidential relationship existed. It is also easier to comprehend why "the files of *The New York Times* were clearly and unequivocally sanitized."[4] of any relevant material it had acquired about the case of *State* v. *Jascalevich* and which had been subpoenaed.

It is apparent that the Petitioners will stop at nothing to thwart the legitimate constitutional rights of an accused in imminent jeopardy of life imprisonment. Their position, then and now, was a ruse to prevent the jury from assessing a central issue in the defense to the indictment. That issue, clearly framed in defense counsel's opening statement to the jury[5] was a challenge to the very bona fides of the indictment and the Petitioners participation in it. The defense presented evidence and testimony which demonstrated that Farber and Baden collaborated with the Bergen County Prosecutor's Office to concoct charges of murder against an innocent citizen for pecuniary gain and to advance their careers.

---

[4] Appendix MM pp. 11-12.

[5] Appendix LL.

What Petitioners sought in this case was the right to be above the law and accountable only to themselves. They sought the right to tamper with citizens' lives and liberty for their own selfish ends. This was made clear during oral argument before the New Jersey Supreme Court in this action. The Court asked the following question and received the following response on behalf of Petitioners:

> "The Court: * * * Suppose a reporter in the course of his investigation comes upon substantial evidence of innocence and he decides *to withhold that because it will make a blockbuster story later on* that they have convicted an innocent man? Can a defendant who learns that this reporter has evidence of his innocence substantial evidence tending to establish his evidence (sic) require the reporter to produce that? Or is it your position that the Shield Law would prevent him from obtaining it and that the reporter can stand behind the Shield Law and say I don't have to produce it? * * *
>
> Mr. Abrams: Yes, sir. Yes, sir. It is my position—
>
> (Respondents Appendix *infra* 1A-2A) (emphasis added)

Certainly, an attorney claiming the attorney-client privilege could not refuse to disclose evidence of innocence if his purpose was to write a "blockbuster" appeal. Clearly, this shows there must be judicial scrutiny and a check on such excesses proposed by any citizen or corporation.

It is just because of such unprincipled and irresponsible positions as that advocated by Petitioner that the value of a written constitution is once again demonstrated. *Marbury* v. *Madison,* 1 Cranch 138, 176-8 (1803). No branch of government is above the written law See, e.g. *United*

States v. *United States District Court*, 407 U. S. 297 (1972) (customary fourth amendment requirement of judicial approval of search warrant necessary despite Executive's opinion); *Powell* v. *McCormick*, 395 U. S. 486 (1969) (House of Representatives not immune from provisions of written constitution). Nor should the "Fourth Estate" be above the law, either. Petitioners desire to be exempt from the requirements of one part of the Constitution, and yet seek refuge in another constitutional protection for the ability to trifle with an innocent citizen's life, liberty and dignity.

It is therefore not difficult to understand why, in this context, Farber sought to hide from every court—including this Court—the fact that he had a tremendous financial interest in this case and submitted what Judge Lacey found as a fact to be "inaccurate and misleading and fabricating"[6] submissions. It is for just these reasons that the Petitioners should not be the ultimate arbiters of a claim of privilege. Without accountability such abuses as occurred in this case—and there are many not yet presented to this Court—will proliferate. It is for this reason that the control of a privilege must be "in public, not private hands" *Branzburg* v. *Hayes*, 408 U. S. 665, 698 (1972) and why the decision of the New Jersey Supreme Court was

[6] Appendix Q. One may also ask why The New York Times did not inform its readership of Farber's clear conflict of interest since Farber had told them as early as January, 1976, of his intentions to profit financially from his stories. Certainly the newspaper would editorialize eloquently if a public official—such as a judge—had a financial interest is a matter upon which he was supposed to exercise independent judgment. Petitioners have demonstrated that they believe such common practices apply only to others and not to themselves. This is not an indicia of the "fiduciary duty to exercise the protected rights responsibly". *Nebraska Press Assoc.* v. *Stuart*, 427 U. S. 539, 560 (1976) that the press must demonstrate in such cases.

just and proper. The invitation of *Branzburg* to the State Legislatures was not an invitation to rescind the Sixth Amendment or to preclude judicial review of the shield laws.

Since an extended discussion opposing the merits of the Petition for a Writ of Certiorari and addressing the jurisdiction of this Court was presented during Respondent's Motion to Vacate the Stay entered by Mr. Justice Stewart, the attention of the Court is respectfully invited to the extensive appendix, transcripts and briefs submitted at that time.

It is urged, moreover, that this case is a uniquely unsuitable vehicle for addressing the question of how the rights of the press and a defendant are treated during a criminal trial, given Farber's participation in the matter and his defiance of all lawful authority. Hopefully, such an egregious situation will not be repeated. Furthermore, Petitioners have only themselves to blame for the incarceration and fines since they chose to avoid the Declaratory Judgment method of resolving this controversy, N.J.S.A. 2A:16-51 *et seq.*; *State* v. *Baird*, 50 N. J. 376 (1967). Farber apparently chose to try to make himself a martyr for no greater reason than to promote the sale of his book. This is consistent with the position urged upon the New Jersey Supreme Court, and rejected. It should similarly be rejected here and does not merit review.

Respondent Dr. Jascalevich submits in light of the unique facts presented in this case, the full explanations directly to Mr. Farber of the consequences of his conduct and the real result that Petitioners seek—to be the ultimate arbiters of a privilege so they can be accountable to no one—that this case is not appropriate for review and presents no substantial constitutional issue. The judgment of the New Jersey Supreme Court was mani-

festly correct and it was only Petitioners attempts to avoid responsibility for obstructing justice, that precipitated the fines and incarceration.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Respondent's Motion to Vacate Stay, a writ of certiorari should not issue to review the judgment and opinion of the New Jersey Supreme Court.

Respectfully submitted,

RAYMOND A. BROWN,
Attorney for Respondent Mario E. Jascalevich, M.D.
BROWN, VOGELMAN & BROWN,
26 Journal Square,
Jersey City, New Jersey 07306.

HENRY F. FURST
On the Memorandum

APPENDIX

Excerpt from Transcript of Oral Argument Before New Jersey Supreme Court on September 5, 1978

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NOS. A-78-78, A-79-78, A-80-78

IN THE MATTER

OF

MYRON FARBER AND THE NEW YORK TIMES COMPANY,
CHARGED WITH CONTEMPT

(commencing at 26-11)

The Court: Well whether or not that's so, Mr. Abrams, you still haven't answered the question that was asked you ten minutes ago by Justice Mountain, and I'm interested in what your answer would be aside from the question of hearing and so forth and so on. Assume that the New Jersey Shield Law does have the broad facial protection that you argue for, and it seems to do so; suppose a reporter in the course of his investigation comes upon substantial evidence of innocence and he decides to withhold that because it will make a blockbuster story

Excerpt from Transcript of Oral Argument Before New Jersey Supreme Court on September 5, 1978

later on that they have convicted an innocent man? Can a defendant who learns that this reporter has evidence of his innocence substantial evidence tending to establish his evidence require the reporter to produce that? Or is it your position that the Shield Law would prevent him (27)* from obtaining it and that the Reporter can stand behind the Shield Law and say I don't have to produce it?

Mr. Abrams: It's my position, Justice Sullivan, that the Shield Law as applied in that situation, would be constitutional.

The Court: Would be constitutional?

Mr. Abrams: Yes, sir.

The Court: And he could stand behind it and refuse to produce evidence of innocence?

Mr. Abrams: Yes, sir. That could stand in that situation just as an attorney could stand behind the attorney-client privilege, just as the priest can stand behind the priest-penitant privilege—

The Court: I'm only asking you about a newspaper man and I have your answer that he can stand behind it?

Mr. Abrams: Yes, sir. Yes, sir. It is my position—

• • •

* Figures in parentheses refer to each new page of the stenographic transcript.